

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

October 18, 2019

Tom Simonite
MuckRock News
DEPT MR 61553
411A Highland Ave
Somerville, MA 02144-2516
61553-13326693@requests.muckrock.com

Re: OSTP-FOIA-18-125

Dear Mr. Simonite:

This letter responds to a Freedom of Information Act (hereinafter “FOIA”)¹ request submitted to the Office of Science and Technology Policy (henceforth “OSTP”) on September 21, 2018. Specifically, the request sought:

- A copy of each OSTP memo on the subject of quantum computing.

Following receipt of this request, OSTP performed a search of its files and located responsive documents totaling 105 pages. After reviewing the responsive records, OSTP determined that the documents should be released in part, with certain information withheld pursuant to Exemptions Five and Six of the FOIA.² Explanations of the exemptions and their applications to the information contained in this response are provided below.

Exemption Five

Exemption Five of the FOIA permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”³ Accordingly, Exemption Five traditionally incorporates the civil discovery privileges: the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege, among others.⁴ In this instance, the information being withheld under Exemption Five is protected from disclosure by the deliberative process privilege.

In order to qualify for the deliberative process privilege, the information must meet three requirements. First, it must be internal to the executive branch agencies.⁵ Second, the

¹ 5 U.S.C. § 552.

² 5 U.S.C. § 552(b)(5)-(6).

³ 5 U.S.C. § 552(b)(5).

⁴ *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984).

⁵ See 5 U.S.C. § 552(b)(5).

information must be pre-decisional, meaning it was prepared prior to an agency decision.⁶ Third, it must constitute a direct part of the deliberative process by offering recommendations or expressing opinions on legal or policy matters.⁷ Furthermore, while factual information is not usually considered deliberative, when the “facts themselves reflect the agency’s deliberative process” it may also qualify for withholding.⁸ Such a situation exists in cases where agency personnel “exercis[e] their judgment” in compiling factual summaries and use discretion to differentiate between significant and non-significant facts.⁹ In this case, the information being withheld includes correspondence between members of OSTP and other federal agencies that contains suggestions and recommendations on non-final agency actions. This meets the requirements of Exemption Five in that, first, the information was internal to executive branch agencies. Second, that the correspondence refers to agency actions that had not yet taken place demonstrates that it was pre-decisional. Finally, it was deliberative in that they contain recommendations on potential courses of action. Release of this information would chill internal debate and inhibit the free-flow of ideas among federal employees, thereby violating the interests protected by Exemption Five.¹⁰

Exemption Six

Exemption Six of the FOIA protects the privacy interests of individuals.¹¹ It permits an agency to protect information within “personal and medical files and similar files” if disclosure “would constitute a clearly unwarranted invasion of personal privacy.”¹² To determine whether information may be withheld under Exemption Six, an agency must undertake a three-step analysis. First, the agency must determine whether a protectable privacy interest would be compromised by the disclosure of the record.¹³ If no privacy interest is identified, the information may not be withheld pursuant to the exemption.¹⁴ Second, the agency must determine whether the release of the document would further the public interest by shedding light on the operations and activities of the government.¹⁵ In cases where no public interest exists “even a modest privacy interest,” will outweigh it every time.¹⁶ Finally, the agency must balance the identified privacy interests against the public interest in disclosure.¹⁷ In this case, direct phone lines and e-mail addresses are being withheld. Individuals, including OSTP employees, have a protectable privacy interest in maintaining the confidentiality of their direct lines and email addresses as their release would potentially subject them to undue harassment by members of the public. Additionally, the release of this information does not shed light on the operations of the federal government. Accordingly, the privacy interests inherent in the withheld

⁶ *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Schell v. Health and Human Serv.’s*, 843 F.2d 933, 941 (6th Cir. 1988).

⁷ *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991).

⁸ *Am. Whitewater Affiliation v. FERC*, 1986 U.S. Dist. LEXIS 17067 (D.D.C. Dec. 1, 1986) (citing *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38-39 (5th Cir. 1992)); see also *Mapother*, 3 F.3d at 1538.

⁹ *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 67-68 (D.C. Cir. 1974).

¹⁰ *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

¹¹ 5 U.S.C. § 552(b)(5).

¹² *Id.*

¹³ See *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008).

¹⁴ *Id.*

¹⁵ See *id.*

¹⁶ *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

¹⁷ *Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994).

information outweighs the public interest in release and the information may be withheld pursuant to Exemption Six.¹⁸

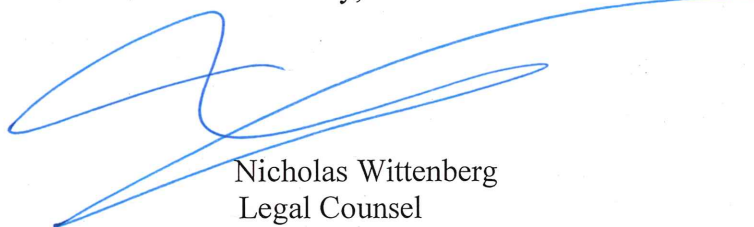
Accordingly, this completes the processing of the request and OSTP now considers the request closed. Pursuant to the FOIA and OSTP regulations, a requester may submit a written appeal contesting any adverse determination.¹⁹ Any appeal related to the processing of this request must either be sent: 1) via e-mail to OSTPFOIA@ostp.eop.gov; or 2) by mail to Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave., NW., Washington, DC 20504.²⁰ In the appeal letter, please specify OSTP Control No. 18-125, "the records requested, and the basis for the appeal."²¹ Any appeal must be sent to one of the above listed addresses no later than ninety (90) calendar days of the date of this letter.²²

Finally, requesters also have the right to seek dispute resolution services from OSTP's FOIA Public Liaison or the Office of Government Information Services (hereafter "OGIS"). To employ these services, please contact Nicholas Wittenberg via telephone at (202) 456-4444 or by way of e-mail at OSTPFOIA@ostp.eop.gov. If you would prefer to contact OGIS, you may do so in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphia Road-OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: (202) 741-5770
Fax: (202) 741-5769
Toll-free: 1 (877) 684-6448

If you have any questions, please do not hesitate to contact me via telephone or by way of e-mail.

Sincerely,

A handwritten signature in blue ink, consisting of a large, stylized 'N' followed by a horizontal line and a small flourish.

Nicholas Wittenberg
Legal Counsel

¹⁸ *Id.*

¹⁹ 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 32 C.F.R. § 2402.7(a).

²⁰ 32 C.F.R. § 2402.7(b).

²¹ *Id.*

²² 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).